Supreme Court, U.S.
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No. 04-1140

In The Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation, and CENTURY-NATIONAL INSURANCE COMPANY, a California corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION FOR REVIEW

Did the district court abuse its discretion in denying plaintiffs an award of attorney fees under 28 U.S.C. § 1447(c) when:

(a) The lower courts found that, at the time of removal, defendants had objectively reasonable grounds, based on novel or unsettled law, for believing removal to be legally proper,

(b) Plaintiffs conceded that, at the time of removal, they also believed the removal was legally proper,

(c) Plaintiffs did not move to remand for more than a year after removal and only when the district court indicated it would likely rule against them on other pending motions, and

(d) The district court denied the remand motion, but was reversed on appeal based on post-removal appellate clarifications previously unsettled law?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties to this case.

CORPORATE DISCLOSURE STATEMENT

Franklin Capital Corporation is an automobile finance company. Franklin Resources, Inc., a publicly held corporation, owns more than 10% of Franklin Capital Corporation's stock.

Century-National Insurance Company is an insurance company which is wholly owned by Kramer-Wilson Company, a privately owned insurance holding company. No parent or publicly held corporation owns 10% or more of Century-National's stock.

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BRIEF IN OPPOSITION

Respondents Franklin Capital Corporation and Century-National Insurance Company respectfully submit that plaintiffs' petition for a writ of certiorari should be denied for the reasons stated below.

STATEMENT OF THE CASE

In 1996 plaintiffs filed this class action in New Mexico state court, alleging they had been overcharged for collateral protection insurance after they failed to maintain their own insurance on the cars they had purchased on credit. Among other relief, plaintiffs sought to void the credit sale contracts for their cars and to recover actual and treble damages, punitive damages, and attorney fees.

Defendants timely removed the case to district court based on diversity jurisdiction. Plaintiffs are New Mexico citizens. Defendants are citizens of other states. Upon removal, Century-National filed a motion to dismiss.

Plaintiffs did not file a remand motion. They opposed the motion to dismiss and proceeded with discovery in district court. A year after removal, they moved for class certification.

More than a year after removal, plaintiffs first raised a "concern" abou urisdiction at oral argument on the motion to dismiss a ter the district court indicated it might grant the motion. Explaining his delay in raising the issue, plaintiffs' counsel said:

> [A]t the time of removal, we interpreted the removal to be [made on the ground that] the plaintiffs arguably had a claim over [$]50,000. Of

course, there was no evidence that each class member had a claim of over [$]50,000. But as this Court knows, the Seven[th] Circuit, in [*Stromberg*], which is at 77 F.3d 721, and earlier the Fifth Circuit in *Abbott* at 51 F.3d 524, both found that the [*Zahn*] case,[1] which said you could not [aggregate], had been overruled by Congress. And so based on the removal at that time, we decided not to contest jurisdiction.

However, last month Franklin put in an affidavit . . . stat[ing] that the [plaintiffs] had made no payments for the [collateral protection] insurance.

[I]n light of the fact that the only basis we know to support jurisdiction which we were willing to accept indicated that there was jurisdiction until this affidavit was submitted to us on October 21, we were willing to accept that.

The district court reserved its ruling on the motion to dismiss and invited plaintiffs to file a motion attacking jurisdiction. Sixteen months after removal, plaintiffs filed such a motion, attacking only the amount in controversy.

Defendants filed opposition contending the amount in controversy requirement was satisfied in three independent ways: (1) the named plaintiffs individually sought relief worth more than $50,000, and the district court could exercise supplemental jurisdiction over class members' claims pursuant to 28 U.S.C. § 1367 even if they

[1] The three cited cases are *Stromberg Metal Works v. Press Mechanical, Inc.*, 77 F.3d 928, 930 (7th Cir. 1996); *In re Abbott Laboratories*, 51 F.3d 524, 527-29 (5th Cir. 1995), *aff'd by equally divided court, sub nom., Free v. Abbott Labs., Inc.*, 529 U.S. 333 (2000); and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

claimed less than $50,000; (2) the class' punitive damages claims could be aggregated and exceeded $50,000; and (3) the class' claim for attorney fees could be aggregated and exceeded $50,000.

The district court denied plaintiffs' attack on its jurisdiction, finding that plaintiffs individually stated colorable claims for an amount which was not certainly less than $50,000. The district court denied plaintiffs' later request that it certify that ruling for interlocutory appeal under 28 U.S.C. § 1292(b), stating: "[m]y exercise of subject matter jurisdiction on the remand issue was properly based upon these considerations of the [complaint's] allegations as of the time of removal. I conclude there is no substantial ground for difference of opinion on this issue."

The district court also denied plaintiffs' class certification motion and granted Century-National's motion to dismiss. At plaintiffs' request, the district court entered judgment dismissing the complaint with prejudice so plaintiffs could immediately appeal the jurisdictional issue.

The Court of Appeals held that defendants had not proven by a preponderance of the evidence, based solely on the complaint and notice of removal, that plaintiffs individually sought more than $50,000.[2] *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290-91 (10th Cir. 2001). It also ruled, as a matter of first impression in that circuit,

[2] The Court of Appeals also pointed out that *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 638-41 (10th Cir. 1998) – issued after judgment was entered in this case – held that 28 U.S.C. § 1367 did not overrule prior authority requiring that each class member individually meet the amount in controversy requirement. *Martin*, 251 F.3d at 1294.

that neither punitive damages nor attorney fees could be aggregated in a class action to reach the amount in controversy. *Id.*, at 1292-93. The Court of Appeals reversed the judgment and remanded the case to the district court, directing that it remand the case to state court.

Plaintiffs then moved for an award of attorney fees and expenses under 28 U.S.C. § 1447(c). The district court denied the motion. It noted that it had discretion to award fees even though no bad faith was shown. Pet. 16a. It should award fees, it said, if it found that the removal was not proper or legitimate – a standard "much different than colorable" – under legal authority extant at the time of removal. *Id.* Aggregation of punitive damages and attorneys fees, the district court concluded, were theories supported by legal authority at the time of removal; hence, the removal was proper. Pet. 17a-19a. Summing up, the district court said:

> . . . I conclude that in October 1996, Defendants had legitimate grounds for believing this case fell within this Court's jurisdiction. I believe that Defendants had objectively reasonable grounds to believe the removal was legally proper. In reaching this conclusion, I have taken into account the complexity and uncertainty of the law in this area. . . . . . Under the circumstances set forth in this decision, I conclude that it is not appropriate to award fees. . . .

Pet. 20a.

Plaintiffs appealed denial of the fee motion, and the Court of Appeals affirmed. It held that the district court had applied the appropriate legal standard in deciding the motion. Pet. 4a-7a. It also agreed with the district court "that at the time defendants removed this action to federal

court on the basis of aggregating punitive damages, they 'had objectively reasonable grounds to believe the removal was legally proper.'" Pet. 7a-8a. "Given the uncertain state of the law on aggregation of punitive damages," said the Court of Appeals, "we cannot say the district court abused its discretion in declining to award fees to [plaintiffs]." Pet. 13a.

REASONS FOR DENYING THE WRIT

Plaintiffs' petition for certiorari should be denied. There is no real conflict among the Courts of Appeals as to the legal standard a district court is to apply in exercising its discretion to award fees under 28 U.S.C. § 1447(c). Any divergence between Court of Appeal decisions on the issue lies solely in the verbal formulas used, not in the substantive results reached.

No court has endorsed plaintiffs' proposal that fees be awarded on remand "absent some special or extraordinary circumstances" or when removal is sought on a novel or untested theory. Pet. 11-13. Quite to the contrary, lower courts agree that fees should *not* be awarded if the law governing removability in a particular case is complex and unsettled, as the lower courts found it was in this case.

The issue for review is not important enough to justify review. In few cases will a fee award turn on precisely where in the spectrum the legal cutoff for a fee award is placed. So long as they retain the substantial discretion Congress intended, district courts are likely to reach the same results no matter what legal standard is stated. A more liberal allowance of fees is unlikely to lower the volume of federal court business appreciably.

I. There Is No Conflict Among The Courts Of Appeals Regarding The Legal Standard For Fee Awards Under 28 U.S.C. § 1447(c)

There is no real, let alone intolerable, conflict among Court of Appeals decisions sufficient to warrant this Court's review of the legal standard for fee awards under 28 U.S.C. § 1447(c). In fact, "[u]se of this fee-shifting power has been non-controversial."[3]

The Courts of Appeals agree that fee awards under § 1447(c) are governed by a relatively simple set of rules: Fees may *not* be awarded when the removal was legally proper, even if the district court mistakenly remanded the case.[4] But if the case was properly remanded, fees may be awarded without any showing that the removing defendant acted in bad faith or with improper motives.[5] In between those extremes, the district courts exercise broad

[3] *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923, 927 (7th Cir. 2000), citing *Morgan Guar. Trust Co. v. Republic of Palau*, 971 F.2d 917 (2d Cir. 1992); *Mints v. Educational Testing Serv.*, 99 F.3d 1253 (3d Cir. 1996); *Avitts v. Amoco Prod. Co.*, 111 F.3d 30 (5th Cir. 1997); *Stallworth v. Greater Cleveland RTA*, 105 F.3d 252 (6th Cir. 1997).

[4] *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 545-46 (5th Cir. 2004); *Roxbury Condominium Ass'n, Inc. v. Anthony S. Cupo Agency*, 316 F.3d 224, 228 (3d Cir. 2003); *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102, 1105 (9th Cir. 2000) ("[W]e will overturn the award if it is based on an erroneous determination of law – that is, if the district court wrongly determined that the case should be remanded to state court.").

[5] *Garbie v. DaimlerChrysler Corp.*, 211 F.3d 407, 410 (7th Cir. 2000); *Balcorta*, 208 F.3d at 1105-06 n. 6 (9th Cir.); *Valdes v. Wal-Mart Stores, Inc.*, 199 F.3d 290, 292 (5th Cir. 2000); *Mints*, 99 F.3d at 1260 (3d Cir.); *Daleske v. Fairfield Communities, Inc.*, 17 F.3d 321, 323 (10th Cir. 1994); *Morris v. Bridgestone/Firestone, Inc.*, 985 F.3d 238, 240 (6th Cir. 1993); *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 448 (9th Cir. 1992); *Morgan Guar. Trust Co.*, 971 F.2d at 923 (2d Cir.).

discretion, and their decisions, reviewed for abuse of discretion, are upheld on appeal with only rare exceptions.[6]

Exercise of that discretion turns mainly on "the nature of the defect in the attempted removal and where the defendant's erroneous action seems to fall on a spectrum running from reasonable to frivolous.[7] The district court will be inclined to order the payment of costs under Section 1447(c) when the non-removability of the action should have been obvious. . . ."[8] Conversely, costs and fees will be denied by the district court when there are reasons

[6] *Hornbuckle*, 385 F.3d at 541 (5th Cir.) (abuse of discretion standard); *Ansley v. Ameriquest Mortg. Co.*, 340 F.3d 858, 864 (9th Cir. 2003) (same); *Suder v. Blue Circle, Inc.*, 116 F.3d 1351, 1352 (10th Cir. 1997) (same); *Mints*, 99 F.3d at 1260 (3d Cir.) (same); *Moore*, 981 F.3d at 447 (9th Cir.) (same).

[7] *Hornbuckle*, 385 F.3d at 541 (5th Cir.) (We "consider the objective validity of the removing party's efforts, at the time that party attempted to remove the case."); *Valdes*, 199 F.3d at 293 (5th Cir.); *Daleski*, 17 F.3d at 324 (10th Cir.) ("propriety of the defendant's removal continues to be central"); *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993) (same).

[8] *Hart v. Wal-Mart Stores, Inc. Associates' Health & Welfare Plan*, 360 F.3d 674, 679-81 (7th Cir. 2004) (two prior Seventh Circuit cases rejected theory); *Hofler v. Aetna US Healthcare of Cal., Inc.*, 296 F.3d 764, 770 (9th Cir. 2002) (numerous courts had rejected similar removal theory; district court has discretion to award fees even if removal theory is "colorable" or "fairly supportable"); *Ansley*, 340 F.3d at 865 (9th Cir.) (defendant had no authority to support complete preemption argument); *Garcia v. Amfels, Inc.*, 254 F.3d 585, 587-88 (5th Cir. 2001) (prior Fifth Circuit cases rejected removal theory); *Suder*, 116 F.3d at 1352-53 (10th Cir.) (test is "propriety" of removal, not whether defendant merely had "colorable" basis); *Mints*, 99 F.3d at 1261 (3d Cir.) (removal petition at best insubstantial).

to believe that the removability of the case was plausible.[9][10]

Other factors may also affect the decision to award fees. Fees may be denied if the plaintiff is partly responsible for the removal, for the case's remaining in federal court, or for altering the case after removal to precipitate a remand.[11] On the other hand, fees may be awarded if the defendant failed to notify the court of developments depriving it of jurisdiction[12] or engaged in other inequitable or improper conduct.[13] Several circuits, therefore, employ a test of "overall fairness given the nature of the case, the circumstances of the remand, and the effect on the parties."[14]

The Seventh Circuit has suggested that if "removal was improper, the plaintiff is *presumptively* entitled to an

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[9] *Martin v. Franklin Capital Corp.*, 393 F.3d 1143, 1148-51 (10th Cir. 2004); *Roxbury Condominium Ass'n, Inc.*, 316 F.3d at 228 (3d Cir.); *Valdes*, 199 F.3d at 293-94 (10th Cir.); *In re Lowe*, 102 F.3d 731, 733 n. 2 (4th Cir. 1996); *Virgin Islands Housing Auth. v. Coastal Gen. Constr. Serv. Corp.*, 27 F.3d 911, 917 (3d Cir. 1994).

[10] 14C CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3739 (3d ed. 2004) (fns. omitted).

[11] *Avitts*, 111 F.3d at 32-33 (5th Cir.); *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 490-91 (9th Cir. 1995); *Bankston v. Burch*, 27 F.3d 164, 169 (5th Cir. 1994); *Miranti*, 3 F.3d at 929 (5th Cir.); *see also Kunica v. St. Jean Fin., Inc.*, 63 F.Supp.2d 342, 352 (S.D. N.Y. 1999); *Shrader v. Legg Mason Wood Walker, Inc.*, 880 F.Supp. 366, 368-71 (E.D. Pa. 1995); *Barraclough v. ADP Auto. Claims Serv.*, 818 F.Supp. 1310, 1313 (N.D. Cal. 1993).

[12] *Morgan Guar. Trust Co.*, 971 F.2d at 924 (2d Cir.).

[13] *Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 322 (10th Cir. 1997) (defendant refused request to remand, though acknowledging that court would likely order remand).

[14] *Morris*, 985 F.2d at 240 (6th Cir.); *Morgan Guar. Trust Co.*, 971 F.2d at 924 (2d Cir.).

award of fees" but "the entitlement is not automatic" and "the presumption is not irrebuttable."[15] The Fifth Circuit has held that an award of fees is not "routine if a party *improperly* removes an action to federal court." Instead, "'[f]ees should only be awarded if the removing defendant lacked 'objectively reasonable grounds to believe the removal was legally proper.'"[16]

Contrary to plaintiffs' argument, the differences between these statements create no real conflict among the circuits. Though employing different verbal formulas, each of the cited Court of Appeals' decisions upheld the district court's exercise of its discretion, except in the few instances when the district court erred in remanding the case. Plaintiffs have not pointed to a single case in which a different result was, or would have been, reached had another circuit's differently worded test been applied.

As the Tenth Circuit aptly stated in its decision below:

> Between these varied expressions regarding § 1447(c), there remains the broadly accepted position that if a defendant's removal could be fairly supported by the law at the time, even if later deemed incorrect, a district court's discretionary decision not to award fees is appropriate. Indeed, most courts do not impose fees when the defendant had a legitimate ground for seeking removal.

393 F.3d at 1147; Pet. 6a.

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[15] *Sirotzky v. New York Stock Exchange*, 347 F.3d 985, 987 (7th Cir. 2003).

[16] *Hornbuckle*, 385 F.3d at 541 & n. 5; *Valdes*, 199 F.3d at 293-94.

There is no conflict among the circuits warranting this Court's review.[17]

II. No Case Supports Plaintiffs' Proposed Test

Plaintiffs urge this Court to hold that fees should be routinely awarded under 28 U.S.C. § 1447(c) upon remand "absent some special or extraordinary circumstances" or at least when "the removal was an unsuccessful attempt to make law expanding the boundaries of federal removal jurisdiction." Pet. 10-13.

None of the hundreds of published lower court decisions on fee awards under 28 U.S.C. § 1447(c) adopts plaintiffs' proposed test. Many expressly reject it, holding that fees should *not* be awarded when the defendant had an objectively reasonable ground for believing that removal was proper – particularly when that belief is based on unsettled, unclear, complex, or developing law on jurisdictional issues.[18]

[17] It is unnecessary to review the district court decisions plaintiffs cite. Pet. 9. Plaintiffs cite only four of the hundreds of published district court decisions on this issue, *see* CHARLES ALAN WRIGHT, ET AL., *supra* n. 10, § 3739 at nn. 69-71, a sufficient indication in itself that the vast majority adhere to the rules stated in the text. The Courts of Appeals can correct the erring handful.

[18] *Martin*, 393 F.3d at 1151 (10th Cir.) (denial of fees no abuse of discretion "[g]iven the uncertain state of the law on aggregation of punitive damages"); *Roxbury Condominium Ass'n, Inc.*, 316 F.3d at 228 (3d Cir.) (fees not awardable when defendant has "colorable removal claim in an area of unsettled law"); *Valdes*, 199 F.3d at 293-94 (5th Cir.) (state law on viability of claim against non-diverse defendant only clarified by post-removal decision); *Virgin Islands Housing Auth.*, 27 F.3d at 917 (3d Cir.) (jurisdictional issue clarified only by post-removal decision); *see also McGettigan v. Ford Motor Co.*, 265 F.Supp.2d 1291, 1299 (S.D. Ala. 2003); *Greaves v. McAuley*, 264 F.Supp.2d 1078, 1088

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The sole support for plaintiffs' proposal is a single law review article which is based on the mistaken notion that Congress amended § 1447(c) in 1988 in order to reduce diversity jurisdiction and discourage removal. Pet. 10-11, citing Christopher R. McFadden, *Removal, Remand and Reimbursement under 28 U.S.C. § 1447(c)*, 87 Marq. L. Rev. 123, 139-40 (2003). The Judicial Improvements Act of 1988 did amend other provisions in order to narrow diversity jurisdiction, but the act evinced no hostility to removal. Further, the House Report on the act shows that the pertinent sentence was added to § 1447(c) for an entirely different reason; namely, to ensure that district courts retained authority to award expenses of improper removals despite the act's elimination of the former removal bond requirement.[19]

Federal fee-shifting statutes are interpreted in light of the public policies they are enacted to achieve. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523-25 (1994). As there is no indication Congress added the key sentence to § 1447(c) in

(N.D. Ga. 2003); *Smith v. Health Center of Lake City, Inc.*, 252 F.Supp.2d 1336, 1346 (M.D. Fla. 2003); *Arlia ex rel. Massey Energy Co. v. Blankenship*, 234 F.Supp.2d 606, 614 (S.D. W.Va. 2002); *Brown v. Florida*, 208 F.Supp.2d 1344, 1351-52 (S.D. Fla. 2002); *Martin v. Mentor Corp.*, 142 F.Supp.2d 1346, 1349 (M.D. Fla. 2001); *Plute v. Roadway Package System, Inc.*, 141 F.Supp.2d 1005, 1012 (N.D. Cal. 2001); *In re Pfohl Bros. Landfill Litig.*, 67 F.Supp.2d 177, 185 (W.D. N.Y. 1999); *Chart Dev. Corp. v. West Slope Water Dist.*, 22 F.Supp.2d 1169, 1170 (D. Or. 1998); *Alcorn v. Union Pac. R.R. Co.*, 3 F.Supp.2d 1085, 1088 (W.D. Mo. 1998); *In re Potash Antitrust Litig.*, 866 F.Supp. 406, 414 (D. Minn. 1994); *California v. Steelcase, Inc.*, 792 F.Supp. 84, 87 (C.D. Cal. 1992); *General Elec. Capital Auto Lease, Inc. v. Mires*, 788 F.Supp. 948, 951 (E.D. Mich. 1992).

[19] H.R. REP. NO. 100-889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 U.S.C.C.A.N. 5982, 6033; *see Wells' Dairy, Inc. v. American Indus. Refrigeration, Inc.*, 157 F.Supp.2d 1018, 1042 (N.D. Iowa 2001).

order to encourage plaintiffs to file remand motions or to discourage defendants from seeking removal, neither *Piggie Park* nor *Christiansburg Garment*[20] applies here, just as they did not in *Fogerty*.

Instead, the rules developed by the lower courts in the cases cited in the preceding section properly effectuate Congress' intent. In § 1447(c), Congress adopted no uniform standard or test, but said simply that district courts "may" award fees on remand. By so doing, Congress intentionally conferred broad discretion on district courts. The propriety of the removal may be the principal factor, but as the decisions cited in footnotes 11-13 above show, a variety of other factors may also influence the district court's decision. The rigid test plaintiffs propose would rob district courts of the ability to tailor their decisions to these and other factors raised by the particular circumstances of the cases before them, contrary to Congress' intent.

In this case, the lower courts properly adhered to the rules stated in the preceding section in deciding plaintiffs' fee motion. Under those rules, fees were appropriately denied because defendants had objectively reasonable grounds for believing removal was proper based on unsettled and developing law. Both lower courts so held. Pet. 7a-13a, 17a-20a. Plaintiffs, themselves, considered the removal proper at the outset, changing their mind only when the district court disclosed its intention to rule against them on the merits.[21] The district court denied

[20] *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

[21] *See Moline Mach., Ltd. v. Pillsbury Co.*, 259 F.Supp.2d 892, 905-06 (D. Minn. 2003) (denying fees because "the basis for removal was

(Continued on following page)

plaintiffs' belated remand motion and their later motion for § 1292(b) certification, finding there was "no substantial ground for difference of opinion" as to the propriety of the removal.

Ruling on the same question, another district court also denied fees on remand because of the unsettled state of the law in 1996 on aggregating punitive damages to meet the amount in controversy requirement. *Haisch v. Allstate Ins. Co.*, 942 F.Supp. 1245, 1252 (D. Ariz. 1996).

III. The Issue Is Not Important Enough To Warrant Review

As there is no real conflict among the circuits, this case would merit review only if the issue it presented for review were of great importance. The issue plaintiffs have raised does not approach the requisite level of significance.

The precise phrasing of the appropriate test for fee awards under 28 U.S.C. § 1447(c) is unlikely to affect the outcome of more than a handful of cases, unless the Court robs the district courts of discretion by adopting plaintiffs' unsupported test. So long as they retain substantial discretion, district courts are likely to reach the same results no matter how the legal standard or test is phrased.

The many published district court decisions awarding or denying fees under § 1447(c) prove the point. There is no evidence that district courts in one circuit award fees substantially more or less frequently than the district

sufficiently compelling that the Plaintiff did not mount any effort toward remand until late in the pretrial process").

courts in other circuits, despite the differences, which plaintiffs emphasize, between different circuits' phrasing of the test for fee awards under that statute.

Even were there a conflict among the circuits on this issue, it would cause few problems. Removal and remand of a case occurs entirely within a single circuit. The parties and the district court may tailor their conduct and decisions to the test adopted by the Court of Appeals for that circuit without any concern that they might later be judged by a different circuit's test.

Adopting plaintiffs' unsupported test to more liberally award fees on remand would not lower the volume of federal court business appreciably. A relatively small percentage of removed cases are remanded to state court. In very few of the remanded cases did the defendant have an objectively reasonable basis for believing removal was proper. A switch to plaintiffs' proposed test would, at most, affect only that small number of cases. More realistically, such a change would impact a tinier fraction still. The risk of owing the plaintiff a few thousand dollars in fees if the court ultimately finds the removal was improper is unlikely to deter many businesses from removing arguably removable cases.

There is no reason for this Court to grant review to announce a test that will achieve so little.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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